No. 20495

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

FARMER BROS. CO.,

Appellant,

vs.

HUDDLE ENTERPRISES, INC.,

Appellee.

Upon Appeal From No. 121,094-MC in the United States District Court, Southern District of California, Central Division.

APPELLANT'S OPENING BRIEF.

WALKER, WRIGHT, TYLER & WARD,
By EDWARD M. LYNCH, and BROWNELL MERRELL, JR.,
210 West Seventh Street,
Los Angeles, Calif. 90014,
Attorneys for Appellant.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

TOPICAL INDEX

TABLE OF AUTHORITIES CITED

Statutes

Textbooks

No. 20495

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

FARMER BROS. CO.,

Appellant,

vs.

HUDDLE ENTERPRISES, INC.,

Appellee.

Upon Appeal From No. 121,094-MC in the United States District Court, Southern District of California, Central Division.

APPELLANT'S OPENING BRIEF.

Jurisdiction.

This is an appeal from an Order of the United States District Court for the Southern District of California, Central Division, sitting as a Bankruptcy Court, which Order was filed herein September 3, 1965 [Tr. Rec. p. 144]. Said Order affirmed an Order of a Referee in Bankruptcy, filed November 30, 1964 [Tr. Rec. p. 73] which denied Appellant, Farmer Bros. Co., authority to foreclose a deed of trust (actually three instruments executed in counterpart) on certain real property held by Appellee, Huddle Enterprises, Inc., debtor under a Chapter XI arrangement. The Referee in Bankruptcy held, among other things, that Appellant was estopped from foreclosing its deed of trust and the District Court on Petition for Review of the Referee's Order

expressly approved the Order and affirmed and adopted the Findings of Fact and Conclusions of Law made by the Referee.

Jurisdiction of the lower court was conferred by Bankruptcy Act, Sec. 1 (11 U.S.C. §1), and Bankruptcy Act, Sec. 2 (10), (11 U.S.C. §11 [10]). Jurisdiction on this appeal is based on Bankruptcy Act, Sec. 24 (11 U.S.C. §47), and Bankruptcy Act, Sec. 316 (11 U.S.C. §716).

Statement of the Case.

Since February 1, 1958, Appellant has been, and now is, the beneficiary and trustee of a deed of trust (three instruments executed in counterpart) executed in its favor by Paul S. Cummins and Ruth Cummins, as Trustors, encumbering eighteen separate parcels of real property situate in the Counties of Los Angeles, Fresno, and Stanislaus [Find. of Fact III; Tr. Rec. p. 63]. Said deed of trust secures payment of a promissory note of even date therewith in the principal sum of $200,000.00 and an addition to said note dated June 5, 1958 in the principal sum of $25,000.00 both executed by said Trustors in favor of Appellant [Find. of Fact IV; Tr. Rec. p. 64].

Appellant's trust deed is a "second" deed of trust, being subject to a "first" deed of trust in favor of United California Bank to secure an indebtedness originally in the sum of $1,000,000.00 and upon which there was remaining unpaid as of October, 1964, the sum of $487,630.41. There is a third trust deed against the eighteen parcels securing an obligation in the face amount of $120,000.00, and a fourth trust deed in the approximate sum of $17,000.00 [Find. of Fact V; Tr. Rec. p. 64].

Each of the eighteen parcels is improved with service station facilities under separate long term leases to the Texas Company (Texaco) [Find. of Fact VI; Tr. Rec. p 65] which long term leases expire September 30, 1970 [Ref. Cert. Rev.; Tr. Rec. p. 98, lines 10-11]. The first trust deed note must be paid in full on or before September 1, 1970 [Ref. Cert. Rev.; Tr. Rec. p. 98, lines 20-26]. To amortize that note, all rental income from the eighteen parcels is presently assigned to and is being collected by United California Bank [Ref. Cert. Rev.; Tr. Rec. p. 102, lines 2-3].

The eighteen service station parcels so encumbered by Appellant's trust deed are some, but by no means all, of the assets of the debtor's (Appellee's) estate, there being a total of twenty-seven separate, improved parcels of realty owned by Appellee [Find. of Fact VIII; Tr. Rec. p. 66].

After Appellant received its trust deed from the Cumminses on February 1, 1958, the latter on or about January 15, 1959, made a general assignment for the benefit of their creditors to Appellee, which assignment included Appellant's encumbered parcels [Find. of Fact VI; Tr. Rec. p. 65]. Then on February 8, 1961, an involuntary petition in bankruptcy was filed against Appellee and on February 9, 1961 it was adjudicated a bankrupt; on June 6, 1961 a petition was filed under Sec. 321, Chapter XI of the Bankruptcy Act (11 U.S.C. §721) proposing a Plan of Arrangement with Appellee's creditors; and, on November 22, 1961 an Order was entered dismissing Chapter XI proceedings and directing that Bankruptcy be proceeded with [Find. of Fact I; Tr. Rec. p. 63].

Thereafter, another petition was filed under Sec. 321 of the Bankruptcy Act proposing an Amended Plan of Arrangement and the same was confirmed and approved by the Court by Order dated February 18, 1964 [Find. of Fact II; Tr. Rec. p. 63]. The Amended Plan after providing in paragraph XI, Article II [Am. Plan, Tr. Rec. pp. 6-7] that the first trust deed against the eighteen service station parcels would be satisfied through the assignment of the rental income from said properties, went on to provide in paragraph XI, Article X [Am. Plan, Tr. Rec. p. 10] as follows:

> "Debtor proposes to pay the interest on claims of junior lien holders at the rate of not to exceed $18,492.00 per annum in equal monthly installments."

Despite the foregoing provision of the Amended Plan, by August 17, 1964, Appellant had not received *any payment* from *any source,* upon its secured debt since before institution of bankruptcy proceedings, and the debt had grown to exceed $295,000.00, and was accumulating interest at the rate of $1,036.30 per month [Find. of Fact XIII, Tr. Rec. p. 67]. Consequently, on said August 17, 1964, Appellant filed its "Petition for Leave to Enforce Trust Deed on Certain Parcels of Property" [Tr. Rec. pp. 30-35], which Petition came on for hearing before the Referee in Bankruptcy on October 13, 1964.

After the hearing was concluded the Referee made and entered Findings of Fact and Conclusions of Law [Tr. Rec. pp. 62-71] wherein he found that Appellant had been tendered the payment of the interest on its trust deed provided for by the Amended Plan but had refused to accept the same [Find. of Fact VIII: Tr.

Rec. p. 67]; that it actively participated in the assignment for benefit of creditors and the debtor's affairs, had not objected to the [Amended] Plan of Arrangement and had led unsecured creditors to believe that it would abide by its terms and conditions [Find. of Fact XX, XXI, XXII; Tr. Rec. pp. 69-70]; and, that a foreclosure on the properties would injure and prejudice the rights of unsecured creditors because the general fund to which they look under the [Amended] Plan of Arrangement is the equity in the service station properties [Find. of Fact XXIII; Tr. Rec. p. 70]. The Referee thereupon concluded that Appellant was bound by the Plan of Arrangement and was estopped from foreclosing [Conclusions of Law II, III, IV; Tr. Rec. p. 71]. On November 30, 1964, the Referee entered an Order denying Appellant leave to foreclose.

Thereafter on December 9, 1964, Appellant petitioned the District Court for a review of the Referee's Order. On September 3, 1965 the District Court filed its Order Affirming Referee's Order of November 30, 1964 stating, "Under the facts of this case the Referee rightly found that Farmer Bros. was estopped to foreclose on their [sic] security at the present time," and expressly adopting the Referee's Findings of Fact and Conclusions of Law [Tr. Rec. p. 144]. From the District Court's said Order, Appellant prosecutes this appeal.

In affirming and adopting the Referee's action, the lower court abused its discretion and committed error in the following particulars:

1. In the absence of express consent, withheld by Appellant, a secured creditor's rights cannot be altered, affected or arranged in a Chapter XI proceeding.

2. Upon proper procedure the Court in a Chapter XI proceeding has the power to stay foreclosures until final decree under Sec. 314 of the Act if, and only if, the debtor can show that (a) the stay is essential to facilitate the primary purpose of the arrangement; and (b) the stay will not cause substantial injury to the secured creditor, neither of which tests was met.

3. Finding of Fact XIII [Tr. Rec. p. 67] to the effect that Appellant was tendered all interest due on its secured debt accruing after the date of the Order Approving the Plan of Arrangement is not supported by the evidence which shows that any tender was a conditional one.

4. By applying the doctrine of estoppel *in pais* the lower court reached beyond the prescribed limits of Chapter XI of the Bankruptcy Act.

5. Findings of Fact XX and XXI [Tr. Rec. pp. 69-70] are based upon a misapplication of substantive law to the facts and do not support the Conclusions of Law regarding estoppel because:

(a) Where an estoppel is based upon silence, the one asserting the estoppel must show a duty to speak, absent from this case.

(b) Appellant's conduct could only amount to representations as to the future, and estoppel *in pais* must be based upon representations as to an existing or past fact or state of things, and is never based upon promises or representations as to the future.

(c) So-called representations on Appellant's part were plainly doubtful and of questionable inference and not such as to justify reliance by a prudent man.

(d) Neither Appellee nor the general unsecured creditors will be, or have been, injured by Appellant's conduct, and detriment is the *sine qua non* of estoppel *in pais*.

6. Finding of Fact No. XXII [Tr. Rec. p. 70] to the effect that certain creditors advanced large sums to procure confirmation of the Amended Plan because Appellant led them to believe that it would abide by the terms and conditions of the Plan does not support the Conclusions of Law regarding estoppel because:

(a) The evidence shows that Appellant has, Appellee has not, complied with the provisions of the Amended Plan.

(b) In any event, there is no finding or showing that such creditors will suffer any injury or detriment.

We point out, parenthetically, that the Transcript of Record contains a Referee's Certificate on Review [pp. 97-143] which summarizes all of the facts, stipulations, and evidence upon which the Referee based the Findings of Fact ultimately approved and adopted by the District Court. There is no contention that the Referee's Certificate is not fair and complete, and it will serve quite capably in lieu of a reporter's transcript. The specifications of error above, summarize Appellant's argument, to which it now proceeds.

ARGUMENT.

I.

Absent Its Consent, Rights of Secured Creditor Cannot Be Affected, or Arranged in Chapter XI Proceeding.

The effect of the Order Affirming Referee's Order of November 30, 1964, made and entered in the Court below denying Appellant permission to foreclose its deed of trust is plainly erroneous in that it sanctions a Plan of Arrangement which purports to arrange the rights of secured creditors. The rights of secured creditors, however, cannot be altered, affected or arranged in a Chapter XI proceeding for the reason that the Bankruptcy Act does not contemplate the inclusion of secured creditors within the pale of the provisions which, together, compose Chapter XI of the Act (U.S.C., Title 11, Chap. 11, §§ 701-709). Sec. 306 of the Bankruptcy Act (11 U.S.C. §706) defines an arrangement as:

> "Any plan of a debtor for the settlement, satisfaction, or extension of the time of payment of his *unsecured* debts, upon any terms." (Emphasis added.)

Similarly both Sections 356 and 357 of the Act (11 U.S.C. §§ 756, 757) dealing with the mandatory and permissive provisions of an arrangement, refer only to *unsecured* creditors. It is implicit in these statutes that an arrangement may not deal with the rights of secured creditors and the cases so hold. Beginning many years ago, in the touchstone case of *Securities & Exchange Commission v. United States Realty and Improvement Co.,* 310 U.S. 434, 84 L. Ed. 1293, 60 S.

Ct. 1044 (1940), the United States Supreme Court said, page 452:

> "Under Chapter XI only the rights of unsecured creditors of the debtor may be arranged and this without altering of the status of any other securities holder. . . ."

(See also *Collier on Bankruptcy,* 14th Ed., Vol. 8 p. 90; Vol. 9, pp. 155, 165.)

On its face, the Amended Plan appears to have but slight impact on Appellant's secured rights. It provides for payment of current interest on junior encumbrances (but not delinquent interest which, in Appellant's case, was in excess of $80,000.00 at date of hearing before the Referee), and does not purport to *prohibit* foreclosures. However, the Referee by Finding of Fact. XXIII [Tr. Rec. p. 70] found that:

> ". . . the General Fund to which unsecured creditors look in this case under the [Amended] Plan of Arrangement as Approved by the Court is the equity in the service station properties upon which Farmer Bros. Co. now seeks foreclosure. . . ."

Additionally, the Referee stated in his Certificate on Review [Tr. Rec. pp. 99-100]:

> "The Amended Plan of Arrangement was based principally upon the belief that within a comparatively reasonable time the debtor corporation could refinance these properties and pay the junior lienholders, and ultimately realize sufficient funds from the operation of this property and/or the sale thereof, to pay general unsecured creditors a substantial dividend."

The Amended Plan provides no period of time, nor any mechanism or method for refinancing secured indebtedness and it is apparent that any such scheme was carefully excluded from its provisions. Had such provisions been included, we cannot believe that the court would have confirmed the Plan for it would fall cleanly outside the scope of a Chapter XI proceeding and, hence, be illegal. Nor, can the Amended Plan be validated by permitting Appellee to stand in the lee of the present restraining order and do what it could not have done by express provision in the Plan.

The extreme scarcity of decisions dealing with situations where a secured creditor's rights were attempted to be arranged would suggest that it is rarely attempted. However, the case of *In re Camp Packing Company,* 146 F. Supp. 935 (N.D.N.Y. 1956) is amazingly identical with the facts presented here. There the debtor owned real properties encumbered by a first mortgagees held jointly by two mortgagees. There, as here, an Amended Plan of Arrangement was proposed, except that in the *Camp* case the Plan expressly contained provisions to the effect that the debtor would be permitted to sell three parcels of real estate designated "surplus property" but encumbered by the first mortgage. It was estimated that the total sum of $57,400.00 would be realized from such sale and the proceeds were to be applied either on the existing mortgage debt or used in refinancing to obtain a new mortgage. The mortgagee objected to this provision of the Amended Plan and requested the Referee to strike the same, but he refused to do so. On Review, the District Court reiterated the rule that a secured creditor's rights cannot be arranged in a Chapter XI proceeding and went on to say, at page 939:

"Only a casual reading of the plan is required. Its end is stated to be the ultimate payment of secured and unsecured creditors, so that its proposals must be construed in the light of its expressed purpose. It proposes to arrange the secured indebtedness by splitting the security in accordance with the Referee's order and selling portions thereof and it purports to reserve the right to use the sale price other than in reduction of the secured debt. It contemplates proceedings whereby the secured indebtedness is to be jeopardized by a sale of the securities free from the lien of the indebtedness. It is inescapable that the plan contemplates an alteration of the status of the secured creditors by judicial compulsion. Such provisions are entirely different from an agreement to obtain the consent of the secured creditor to the modification of his rights. Such an agreement seems to be an authorized part of the plan. (*Collier on Bankruptcy,* 14th Ed., Vol. 8, pages 1077 and 1086.)"

The court in the *Camp* case suggests that a secured creditor may expressly consent to that which would otherwise be impossible and such seems to be the rule. So. in *Collier on Bankruptcy,* 14th Ed., Vol. 9, page 187, the textwriter says:

"While the rights of the secured creditor cannot be dealt with in the Chapter XI proceeding itself, there is no restriction against the making of a voluntary agreement outside the proceeding for modifying those rights, and the debtor can provide in the arrangement that he will procure such agreement."

The Amended Plan at bar, however, contains no provision for obtaining any secured creditor's consent to its provisions and Appellant, on many occasions, expressly refused to agree not to foreclose. Thus, Mr. Baird, a witness called by Appellee, testified that agents of Appellant, ". . . when asked at various times if they would sign an agreement not to foreclose answered—'We will not sign such an agreement'" [Ref. Cert. Rev.; Tr. Rec. p. 120, lines 6-9]. Moreover, Appellant, as one of Appellee's major *unsecured* creditors, has never filed its consent to the approval of the Amended Plan [Ref. Cert. Rev.; Tr. Rec. p. 105, lines 12-14].

II.

On Proper Showing Court May Stay Foreclosures Until Final Decree Under Section 314 of the Bankruptcy Act.

To the foregoing rule that a secured creditor's rights cannot be altered, affected or arranged in a Chapter XI proceeding, there exists not an exception, but rather, a qualification. This qualification is found in Sec. 314 of the Act (11 U.S.C. §714) which provides in pertinent part as follows:

> "The Court may . . . upon notice and for cause shown, enjoin or stay until final decree any action or the commencement or continuation of any proceeding to enforce any lien upon the property of a debtor."

Appellee at any time over the years could have brought on a proper order to show cause under Sec. 314 of the Act against all lienholders but for some reason,

not apparent in the record, chose not to do so. However, since Appellee may contend that Appellant's petition to enforce trust deeds is tantamount to a Section 314 proceeding, we feel that it is essential that that section of the Bankruptcy Act be briefed to the end that it be shown inapplicable to the facts at bar.

Section 314 provides no basis for arranging a secured creditor's rights. It merely provides a mechanism whereby the Referee, on a proper showing, can maintain the *status quo* with regard to secured creditors for a limited period of time. It is not a mechanism for placing secured debts under a general moratorium for that would be "arrangement". As the court correctly observed in *In re Empire Steel Company,* 228 F. Supp. 316 (D. Utah, 1964), p. 319:

> "The 'status' of secured creditors then unavoidably would be affected, for status depends not only upon assurance of eventual payment but the right to payment or enforcement in point of time bearing some relationship to the conditions of the security instrument."

(*Cf. Chaffee County Fluorspar Corporation v. Athan,* 169 F. 2d 448, 450 (C.A. 10th, 1948); *In re Holiday Lodge, Inc.,* 300 F. 2d 516, 519 *et seq.* (C.A. 7th. 1962); *In re Murel Holding Corporation,* 75 F. 2d 941, 942 (C.A. 2d, 1935).)

Consequently, a proper showing under Section 314 of the Act is made when the debtor can show that (1) the injunction is necessary to facilitate the primary purpose of the arrangement; and, (2) that the injunction will not cause substantial injury to the secured creditor. These tests are not met in the case at bench.

A. Retention of Secured Parcels Not Necessary to Facilitate the Plan of Arrangement.

The classic illustration of the first qualification would be a situation where the debtor under arrangement owns a manufacturing plant subject to a deed of trust. If he can remain in business a relatively short period of time he will be able to pay a good percentage of the debts of his unsecured creditors from the proceeds of a contract he is in the process of completing. However, if the trust deed holder be permitted to accelerate the payment of his note and foreclose on the manufacturing plant, the debtor will then be put out of business. In such a situation it is obvious that a stay of foreclosure under Section 314 of the Act would be necessary to facilitate the primary purpose of the arrangement and the first test would be met.

The best illustration of the rule is found in *In re Tracy,* 194 F. Supp. 293 (N.D. Cal., 1961), where a secured creditor held a trust deed upon the debtor-under-arrangement's home and also upon his place of business. The debtor, having failed to make the periodic payments on the secured debt, the home and the business property were advertised for foreclosure sale and the debtor petitioned for a stay under Section 314 of the Act and a stay order was made. On Review, the District Court said, pages 295-296:

> "The Court has the power to restrain sale of the property in question under the deeds of trust, only if necessary to facilitate the primary purpose of this proceeding, and if it does not cause substan-

tial injury to the lienor (See *Chaffee County Fluorspar Corp. v. Athan, supra*).

"It seems possible, from all the facts now before this Court, that Debtor's current accounts receivable are more than ample to pay his unsecured creditors, and that all that is necessary by way of an arrangement between Debtor and his unsecured creditors is that he be given time to collect those accounts receivable. If this is so, it well may be an abuse of discretion to restrain the sale of the residence and place of business under these Chapter XI proceedings, for that sale would be of no importance to the unsecured creditors, and would be a matter strictly between Debtor and Crane Co. If there is to be an arrangement for the primary purpose of altering the rights of creditors holding debts secured by real property, it must be under the provisions of Chapter XII of the Bankruptcy Act, and may not be confirmed without acceptance under those provisions (Title II U.S.C.A. §806(1), 866-872).

"It is, of course, true that the accounts receivable may prove to be uncollectible. In that event, the sale of Debtor's place of business before he can dispose of his stock in trade may disrupt the Chapter XI proceeding. It is obvious that under such conditions the order restraining the sale of the place of business would be a legitimate exercise of the Referee's discretion."

In remanding the case for making further Findings of Fact with regard to the business property so as to enable the court to determine whether the Referee abused his discretion, the court implicitly recognized

that the Debtor's home could not be necessary to the plan of arrangement, saying, page 296:

> "On the basis of the record now before the Court, it would not appear to be legally objectionable to permit the sale of the residence under the deed of trust, even if the sale of the business property may have to be restrained to prevent disruption of the arrangement."

There is no evidence in the record before this Court that the parcels encumbered by Appellant's trust deed were or are necessary to facilitate the arrangement. The only evidence in the record is precisely to the contrary for the following reasons:

1. The debtor presently receives no income whatsoever from these properties since all such income is assigned to the United California Bank, who is the first lienholder [Ref. Cert. Rev. p. 102, lines 2-5; Tr. Rec. p. 102], and will be so assigned and collected by it until September 1, 1970 [Ref. Cert. Rev.; Tr. Rec. p. 102, lines 29-30].

2. Furthermore, the court expressly found on the evidence before it [Find. of Fact XVI; Tr. Rec. p. 68]:

> "That there are funds in substantial amounts coming into debtor's estate other than from rentals of the various service stations described in Farmer Bros. Co.'s petition, which are and will be available for the execution of the Plan of Arrangement. . . ."

Therefore, it is clear that this property, like the debtor's home in the *Tracy* case simply is not necessary to facilitate the primary purpose of the arrange-

ment. The debtor derives no income therefrom and has sufficient income from other sources with which to execute the Plan.

B. Effect of Stay Order Causes Substantial Injury to Petitioner.

The second half of the limitation on the court's power to stay foreclosure enunciated by the *Tracy* case is to the effect that a stay of foreclosure cannot cause "substantial injury" to the *secured creditor.* (See also *Collier on Bankruptcy,* 14th Ed. Vol. 8, p. 266) Despite this further limitation the court expressly found [Find. of Fact XXIII; Tr. Rec. p. 70]:

> "That a foreclosure by Farmer Bros. Co. on the property upon which it has security in this case would substantially injure and prejudice the rights of *unsecured* creditors because the General Fund to which *unsecured* creditors look in this case under the Plan of Arrangement as approved by the Court is the equity in the service station properties upon which Farmer Bros. Co. now seek foreclosure . . ." (Emphasis added.)

To the extent that the court has based its injunction on a finding of injury to the *unsecured* creditors, it has applied the limitation on its discretion layed down in the foregoing authorities and implicit in the Bankruptcy Act, *exactly in reverse!*

On the other hand, there was evidence in the record which clearly establishes that Appellant is "substantially injured" by the stay order. We have heretofore pointed out with appropriate reference to the record that to the time of the hearing on Appellant's Petition For Leave To Enforce Trust Deeds, it had received no

payment on its secured obligations for well over four years and its secured debt had steadily risen to over $295,000.00 and to the date of the writing of this brief, the picture is unchanged (the debt is now approximately $310,000.00). Secondly, the lien of the first trust deed holder will not be paid off until September 1, 1970 while the lease to the Texas Company, wherein lies the value of these properties, expires on September 30, 1970, Thirdly, while at the time Appellant took its security all the parcels were in use as service station properties, one of the properties has ceased to operate as a service station site through the impact of eminent domain and is now vacant and unused by Texaco [Ref. Cert. Rev. p. 101, lines 12-15]. It is evident from the foregoing established facts that Appellant's debt is virtually under a moratorium and will effectively be so until 1970 when the use of the land upon which it took its security expires, and that it must meanwhile guess and speculate as to its position five years hence.

It is legally insufficient to answer that Appellant is adequately secured. Adequacy *versus* inadequacy of the security is not the test. In *In re Empire Steel Company,* 228 F. Supp. 316 (D. Utah, 1964) cited *supra,* the Referee in Bankruptcy upon *ex parte* application entered an order staying suits, including suit of The Small Business Administration to foreclose a loan agreement secured by real and chattel mortgages on which there was due approximately $70,000.00. On Review, the court pointed out the following (pp. 316-317):

> "The Referee indicated that the only basis for a valid objection to the stay would be proof that

the value of the government security had so greatly diminished as to become insufficient, and that the only essential on which the government could be heard was whether the debt was approaching or exceeding the value of the property."

In remanding the case for further proceedings before the Referee, it said:

"The Referee's consideration of the propriety of the stay was too narrow. The adequacy or inadequacy of the government's security was only one of the questions upon which a decision should have been predicated.

"The present stay does not appear to be justified upon the record before the Referee."

We can find no case under Chapter XI of the Bankruptcy Act where a stay order under Section 314 was upheld on the basis of a showing that the secured creditor was adequately secured.

C. No Evidence of Tender of Monthly Interest Under the Amended Plan.

Appellee may contend that Appellant has compounded its hardship by refusing to accept the interest provided for in Paragraph XI, Article X of the Amended Plan of Arrangement. In that connection the court made the following finding [Find. of Fact XIII; Tr. Rec. p. 67]:

". . . that the debtor has tendered to Petitioner all interest due under said debt pursuant to the Plan of Arrangement accruing from and after the date of the Order Approving the Plan of Arrangement, and said Petitioner has thus far failed to accept said interest. . . ."

That finding is, as a matter of law, unsupported by the evidence. The only evidence (excluding that offered by Appellant) to support such finding was, that Appellee offered to pay Appellant the interest as provided in the Amended Plan on the condition that Appellant withdraw its Petition to Enforce Trust Deeds. Thus, Appellee's own evidence in this regard was the following [Ref. Cert. Rev.; Tr. Rec. p. 123, lines 15-30]:

> "Mr. Baird testified that since the approval of the plan of arrangement, he had a meeting in the office of Mr. Lynch, one of counsel for Farmer Bros. Co., with Mr. Lynch, Mr. MacIntosh and Mr. St. John to discuss if it were possible to solve the foreclosure problem presented by the petition for authority to foreclose. In the course of those discussions, Mr. Baird stated in substance or in effect that *if* the debtor paid interest from the date of confirmation of the plan, as provided in the plan, would Farmer Bros. Co. be willing to withdraw the present action. Mr. Baird offered at that time to make such payment *if* this action were withdrawn. Mr. Baird further stated that the debtor was in a position to pay the interest now and that he would *recommend* the payment of this interest to the board of directors, and that he did not anticipate any trouble in getting the consent of the board of directors." (Emphasis added).

A tender must be absolute and unconditional. *Calif. Civ. Code,* Sec. 1494; *Schiffner v. Pappas,* 223 Cal. App. 2d 526, 530 (1963). In 47 *Cal. Jur.* 2d, p. 266, it is said:

> "A tender is ineffectual when accompanied by a condition that the one making the tender has no

> right to impose. As expressed by statute, an offer of performance must be free from any conditions that the creditor is not bound to perform."

Manifestly, the condition was one upon which Appellee had no right to insist. Obviously, the evidence does not support the finding of a tender.

From the foregoing it must be concluded that since the security is not necessary to facilitate the Amended Plan of Arrangement and since Appellant is substantially injured, particularly by the moratorium that exists on its debt, there is no legal justification for basing a stay of foreclosure on Sec. 314 of the Bankruptcy Act even if it could be successfully asserted that the lower court was in a procedural posture where it could apply Sec. 314.

III.

Doctrine of Estoppel Unavailable as Instrument to Reach Beyond Limits of Bankruptcy Act.

The next question raised on this appeal appears to be one of first impression and may be stated in this fashion: Can a secured creditor's rights be altered, affected, modified, or otherwise arranged in a Chapter XI proceeding through application of the doctrine of estoppel *in pais*? We are unable to find a single case that so holds and have been cited to none.

Consequently, this court is presented with the opportunity of engrafting into the Bankruptcy Act the first true exception to the rule that a plan of arrangement cannot affect the status or rights of a secured creditor. We contend that the opportunity should not be utilized. We insist that the court below committed error in applying the doctrine of estoppel to reach beyond

the prescribed limits of Chapter XI of the Bankruptcy Act.

Estoppel *in pais,* by the very soubriquet attached to it, "equitable estoppel," is obviously based upon equitable consideration. The fact that a Bankruptcy Court may apply equitable principles in aid of its functions should not permit it to affect the rights of secured creditors in order to "do justice" to unsecured creditors, when the provisions of Chapter XI of the Bankruptcy Act do not so contemplate. While the facts are not analogous, the rule layed down in *Guerin v. Weil, Gotshal & Manges,* 205 F. 2d 302 (C.A. 10th, 1953) seems *apropos.* There, at page 304, it is said:

> "Although it has been broadly stated that a bankruptcy court is a court of equity, *Young v. Higbee Co.,* 324 U.S. 204, 214, 65 S. Ct. 594, 89 L. Ed. 890, the exercise of its equitable powers must be *strictly confined within the prescribed limits of the Bankruptcy Act.* See *Berry v. Root,* 5 Cir. 148 F. 2d 945, 946, *certiorari* denied 326 U.S. 755, 66 S. Ct. 91, 90 L. Ed. 453. Where Congress intended that allowances should be made it has carefully enumerated them, and any omissions must be construed as express exclusions, *3 Col. Bankruptcy,* 1534-7 (14th Ed.)." (Italics supplied).

Consistent with the foregoing principle is the case of *In re Camp Packing Co.,* 146 F. Supp. 935 (N.D.N.Y., 1956) discussed *supra,* p. 10 which did involve a Chapter X1 proceeding wherein rights of secured creditors were attempted to be arranged in a manner much like that contemplated here. After reviewing the principles of law discussed in detail at the beginning of this

brief, to the effect that secured rights cannot be arranged in a Chapter XI proceeding, the court said (146 F. Supp. 935, 939):

> "It is an ineffective argument that equitable considerations justify the inclusion therein of the proposals under consideration. True, a bankruptcy court is a court of equity *but the exercise of its equitable powers must be strictly confined within the prescribed limits of the Bankruptcy Act . . .*" (Citation omitted, italics supplied).

Earlier, in *Securities & Exch. Com. v. United States Realty and Improvement Co., supra,* the Supreme Court had said (310 U.S. 455):

> "A bankruptcy court is a court of equity, §2, 11 U.S.C.A. §11, and is guided by equitable doctrines and principles except so far as they are inconsistent with the Act . . ." (Citations omitted).

From the foregoing authorities it would seem that unless Appellee can demonstrate that there is some other, broad, effective grant of power to be found in Chapter XI of the Bankruptcy Act, the lower court committed error in applying the doctrine of estoppel to alter, affect or modify Appellant's rights and status as a secure creditor.

IV.

No Basis for Application of Estoppel in Pais.

Assuming that this Court can hold that the doctrine of estoppel may be utilized as a matter of law to affect Appellant's status as a secured creditor, the final question to be resolved on this appeal is whether or not an estoppel *in pais* could be found in the facts placed before the court below. Appellant contends that the lower

court misapplied the substantive law of equitable estoppel to the facts that were put before it and that the Findings of Fact otherwise do not support the Conclusions of Law.

Findings of Fact XX, XXI and XXII [Tr. Rec. pp. 69-70], are the only findings upon which an estoppel could be predicated.[1] Findings XX and XXI turn more upon conduct, largely silence, rather than representations. Hence, those two Findings will be reviewed together, but separately, from Finding XXII.

In their totality, however, we insist that these Findings do not support the Conclusions of Law and the ultimate Order made by the court below for these reasons:

1. Where an estoppel is based upon silence, there must be a duty to speak, absent from this case.

2. Any acts or conduct upon Appellant's part could only amount to representations as to the future, and estoppel *in pais* must be based upon representations as to an existing or past fact or state of things and is never based upon promises or representations as to the future.

3. So-called "representations" on Appellant's part were plainly doubtful and of questionable inference and not such as to justify reliance by a prudent man.

4. Appellee was not, and will not, be prejudiced or injured by Appellant's conduct, and detriment is the *sine qua non* of estoppel *in pais*.

The substantive law of the State of California on the doctrine of estoppel is set forth in the form of a con-

---

[1]Finding of Fact No. XXIV [Tr. Rec. pp. 70-71] is obviously a Conclusion of Law.

clusive presumption in *Calif. Code Civ. Proc.,* Sec. 1962(3) as follows:

> "The following presumptions, and no others, are deemed conclusive:
>
> * * * * *
>
> "(3) Whenever a party has, by his own declaration, act, or omission, intentionally and deliberately led another to believe a particular thing true, and to act upon such belief, he cannot, in any litigation arising out of such declaration, act or omission, be permitted to falsify it . . .".

Amplifying on the statute, a long line of California cases has enunciated four "elements" which must be present before the doctrine will apply. Best illustrative of these decisions is *Safway Steel Products, Inc. v. Lefever,* 117 Cal. App. 2d 489, 491 (1953) where it is said:

> " 'In general, four things are essential to the application of the doctrine of equitable estoppel: First, the party to be estopped must be apprised of the facts; second, he must intend that his conduct shall be acted upon, or must so act that the party asserting the estoppel had a right to believe it was so intended; third, the other party must be ignorant of the true state of facts; and fourth, he must rely upon the conduct to his injury.' "

From the foregoing, the first element which must be found to be present is some declaration, act, or omission on the part of one "apprised of the facts." Since there is no claim of "omission" on Appellant's part, the Findings of Fact upon which the doctrine of estoppel was applied readily, divided themselves into two categories, viz.: (1) declarations, *i.e.,* express represen-

tations; and, (2) acts or implied representations through either silence or conduct contended to be communicative. The first two attacked findings being based virtually entirely upon silence or inaction, rather than express assertions or representations, are considered first.

The first of the Findings upon which an estoppel could be predicated is XX [Tr. Rec. p. 69] where the Court found:

> "That Farmer Bros. Co. was one of the secured and unsecured creditors who actively participated in the assignment for the benefit of creditors given by Paul S. Cummins and Ruth Cummins, his former wife, to the debtor corporation, which Farmer Bros. Co. helped to organize and who had one of its officers or agents upon the Board of Directors of the debtor corporation at all times; that Farmer Bros. Co. advanced the sum of $343.41 to help defray the expense of preparation of the schedules necessary for the Plan of Arrangement, and Farmer Bros. Co. participated in the preparation and the presentation of the Plan of Arrangement in this case, and never at any time raised any objection thereto, and at all times indicated its willingness to abide by the terms and conditions of the Plan of Arrangement."

The second Finding is XXI [Tr. Rec. pp. 69-70] where the Court found:

> "That Farmer Bros. Co. had a member of the Official Creditors' Committee, appointed by the Court, actively participating in the Creditors' Committee at the time the Plan of Arrangement was proposed by the unsecured creditors, and there-

after until his decease; and that thereafter, Mr. Ronald St. John of Farmer Bros. Co. sent a letter to this Court requesting that he be appointed to said Committee."

It is true that Appellant participated in the assignment for benefit of creditors; that it ultimately had a representative on Appellee's Board of Directors (which body became more or less inactive after August 24, 1961 [Tr. Rec. p. 114, lines 11-14; p. 118, lines 5-29]); that it had a representative on Appellee's creditors' committee from its formation on August 14, 1962 until the late fall of 1963;[2] and, that it advanced the sum of $343.41 to help defray the expense of preparation of schedules necessary for the Plan of Arrangement.[3] But there is absolutely no evidence that it, ". . . participated in the preparation and the presentation of the Plan of Arrangement . . .", if the finding is intended to refer to the *Amended* Plan; and, if it can be said that Appellant, ". . . never at any time raised any objection thereto, and at all times indicated its willingness to abide by the terms and conditions of the [Amended] Plan of Arrangement," such finding must be predicated on silence alone.[4] For the very best evidence Appellee

---

[2]Appellant's Heistand died in December, 1963 [Ref. Cert. Rev.; Tr. Rec. p. 106, lines 1-2], while Appellant's Credit Manager St. John has never been an official member of the Creditors' Committee [Ref. Cert. Rev.; Tr. Rec. p. 104, lines 14-21].

[3]The Findings speak loosely of the "Plan of Arrangement" without differentiating between the Amended Plan of Arrangement before this Court. While Appellant did advance funds to secure confirmation of the "original" Plan of Arrangement which fell through in 1961, Appellant expressly refused to contribute anything toward defraying expenses of the *Amended* Plan of Arrangement [See, Ref. Cert. Rev.; Tr. Rec. p. 135, lines 21-28].

[4]The uncontradicted evidence is that Appellant, as an unsecured creditor, has never filed its consent to the Amended Plan of Arrangement [Ref. Cert. Rev.; Tr. Rec. p. 105, lines 12-15].

offered to sustain such finding was, summarized, the following:

1. (February 7, 1961) "Mr. Baird testified that he went into the subject of the question of the full cooperation of the secured creditors and that this question had been frequently discussed at both creditors and directors meetings. There was never any indication at any time on behalf of Farmer Bros. Co. by any of their representatives, that they did not intend to cooperate." [Ref. Cert. Rev.; Tr. Rec. p. 120, lines 15-21].

2. (January 10, 1963) At a meeting of the Creditors' Committee, discussions were had regarding commitments of secured creditors, and the contact of junior lienholders. It was discussed, generally that a Chapter XI proceeding affects and is binding upon all unsecured creditors if a majority in number and amount of creditors vote in favor of the Plan and consent to the Plan, but that these consents do not bind junior lien holders unless they consent.

"Mr. Heistand, [Appellant's Credit Manager] to the best of Mr. Baird's memory, did not say anything." [Ref. Cert. Rev.; Tr. Rec. pp. 121-122].

3. (Meetings of Creditors' Committee during 1961, 1962, 1963) Mr. Cummins, called by Appellee, testified, ". . . that it was discussed at those meetings how the question of payment of Farmer Bros. Co.'s secured claim would be handled under the Plan of Arrangement and at no time did he hear any objection from any representative of Farmer Bros. Co. as to the nature of the Plan of

Arrangement that was being proposed." [Ref. Cert. Rev.; Tr. Rec. p. 130, lines 26-31].

4. Mr. Tongue testified generally, "That at every one of those meetings where such matters were discussed, it was no more than normal that the Committee would be considering the effect of the necessity of maintaining the secured properties together as a package for the general benefit of unsecured creditors in the long pull, and that those matters were discussed; that a representative of Farmer Bros. Co. was present, Mr. Heistand, but that Mr. Tongue could not recall any comments that were made by him at the time." [Ref. Cert. Rev.; Tr. Rec. p. 135, lines 10-19].

5. (Undated meetings of Debtor's Board of Directors). Mr. Baird testified: "No representative of Farmer Bros. Co. at any of these meetings ever stated that Farmer Bros. Co. intended to foreclose. On the contrary on a number of occasions, Mr. Keefe, Mr. Demmett and Mr. Heistand said to Mr. Baird, in the presence of other creditors and other directors, when asked at various times if they would sign an agreement not to foreclose, in sum and substance answered, *'We will not sign such an agreement.* However, we haven't taken any action so far and we intend to cooperate as much *as we can in the future',* or words to that effect." [Ref. Cert. Rev.; Tr. Rec. p. 120, lines 2-11]. (Italics supplied).

6. (Undated Meetings, Debtor's Board of Directors and Creditors' Committee) Mr. Baird testified: "At those meetings when a representative of Farmer Bros. Co. was present, the question of the

> cooperation of the principal creditors carrying out the intent and purpose of the Plan of Arrangement was discussed—in other words, that there would be no foreclosure." [Ref. Cert. Rev.; Tr. Rec. p. 121, lines 24-28].

It was error by the lower court to apply an estoppel on such evidence.

A. Estoppel Cannot Be Based Upon Silence, Absent a Duty to Speak.

The foregoing summary of the evidence upon which Findings XX and XXI were based (except for Appellant's express refusals to agree not to foreclose), shows that if Appellee relied upon anything, it relied upon Appellant's inaction, or silence. However, before estoppel can be based upon silence, there must be shown a duty to speak. Thus, in *Johnson v. Johnson,* 197 Cal. App. 2d 326 (1960), where defendant made valuable improvements to a parcel of property theretofore partitioned to plaintiff, the court said, in refusing to find an executed oral license in defendant on the basis of estoppel *in pais,* at page 330:

> "Generally speaking, ' "mere silence on the part of a party will not create an estoppel unless he was under some obligation to speak, and a party invoking such estoppel must show that it was the duty of the other to speak, and that he has not only been induced to act by reason of such silence, but that the other had reasonable cause to believe that he would so act".' (*Arp v. Blake,* 78 Cal. App. 713, 722 [3] [248 P. 750] (1926).)"

As a secured creditor, Appellant had no right to speak in the arrangement of Appellee's affairs. It had

no voice of approbation or disapprobation. In *Pride of Virginia Poultry Corporation v. Rocco Feeds, Inc.* 270 F. 2d 852 (C.A. 4th, 1959), it is said, page 855:

> "Even if the very definition of 'creditors' and 'claims' in Ch. XI did not make it clear that only unsecured creditors may vote on a plan of arrangement, it is settled by the cases that only claims of unsecured creditors may be 'affected' by an arrangement, and sec.362 of the Act provides that only creditors affected by the plan may accept it."

It is crucial to an understanding of Appellant's position that it be remembered that it was not merely a secured creditor—it was one of five major *unsecured* creditors of Appellee as well [Ref. Cert. Rev.; Tr. Rec. p. 116, lines 2-14]. As a major, unsecured creditor Appellant had every right to attend creditors' meetings and otherwise participate in the affairs of the debtor. The latent vice of the foregoing Findings of Fact is, however, that it is implicit therein that the lower court drew the inference that Appellant was at all times acting in its capacity both as a secured and unsecured creditor. Even as a secured creditor, it must be supposed that Appellant was more interested in what the Amended Plan said than what was said about it, and it did not, and does not, on its face, purport to affect Appellant's security or impair its ability to foreclose other than by requiring prior court approval. [Am. Plan, Par. XIII; Rec. Tr. p. 14] What does it say which would cause Appellant alarm?

If conduct sufficient for an estoppel can be predicated upon these facts, it is submitted that in every Chapter XI proceeding, a creditor who is both secured

and unsecured would be compelled to act at its peril when exercising its rights as an unsecured creditor, subjecting itself to great risk as a secured creditor by any participation whatsoever in the affairs of the debtor under arrangement.

B. Estoppel Cannot Be Based Upon Promises Concerning the Future.

Secondly, the acts and conduct upon Appellant's part obviously related to the future, that is, prospective conduct. In other words, whatever Appellant did must, in summation, amount to the representation: "Regardless of what may transpire, I will not seek to foreclose my deed of trust". The Court's attention is invited to what Appellant actually said, ". . . 'we intend to cooperate as much as we can in the future,' or words to that effect." [Ref. Cert. Rev.; Tr. Rec. p. 120, lines 8-10].

The California substantive law is clear to the effect that estoppels *in pais* cannot be predicated upon representations or promises concerning the future. To illustrate, in *Bank of America v. Pac. Ready-Cut Homes,* 122 Cal. App. 554 (1932) a subcontractor assigned his rights to receive progress payments from defendant to the plaintiff bank, to secure an advance. After defendant had inquired of plaintiff whether or not the assignment covered all future progress payments and learned that it did, defendant wrote plaintiff saying (p. 559) ". . . we have made a note on our records and will remit all future payments to you until notified otherwise." Thereafter, plaintiff made further advances to the subcontractor. When it sued defendant for the balance of the subcontract price and de-

fendant asserted a setoff against the subcontractor, it was claimed that the defendant was estopped but the court said, page 562:

> "It is the general rule that in order to work out estoppel by representations, the representations must be as to facts either past or present and not as to promises concerning the future. Promises as to future conduct or perfomance, if binding at all, must be binding as contracts. . . ." (Citations omitted).

(As in accord, see also *Hosner v. Skelly,* 72 Cal. App. 2d 457, 463 (1946); *Berverdor, Inc. v. Salyer Farms,* 97 Cal. App. 2d 459, 464 (1950)).

The same rule is applicable and should have been applied her. We pointed out, *supra,* page 25, that one of the basic elements of estoppel is the requirement that the representation be made by one, "having knowledge of the facts". The "facts" of which Appellant would have had to have knowledge was whether or not, at some future time, it would seek permission to foreclose its deed of trust. Obviously, any decision in this regard would be dictated by the future course of events. Manifestly, the cause of Appellant's application to foreclose its trust deed was the breach of Paragraph XI, Article X of the Amended Plan providing for payment of interest on junior encumbrances in monthly installments. Clearly, whether the provision of the Amended Plan would be abided by was something over which Appellant had no control. Other facts could have as easily intervened which might have compelled Appellant to apply to the court for leave to foreclose to protect its security. For this reason, the rule that es-

toppels are not predicated upon promises as to the future is a salutary one, and should have been applied on the facts.

C. "Representations" Not Such to Justify Reliance by Prudent Man.

The "representations" attributed to Appellant were plainly not such as would justify reliance thereon by a prudent man. In *General Motors Accept. Corp. v. Gandy,* 200 Cal. 284 (1927), at pages 297, 298 the California Supreme Court said:

> "As a rule, manifestly, an equitable estoppel must be proved by oral testimony, hence the rule that certainty is essential to all estoppels is peculiarly applicable to estoppels *in pais.* The estoppel must be so established as to leave nothing to surmise or questionable inference. In other words, the representation, whether express or implied from the conduct of the party against whom the estoppel is sought to be invoked must be such as to justify a prudent man in acting upon it, and must be plain and not doubtful."

In view of Appellant's *express* refusal to agree not to foreclose, we cannot see how it can be contended that Appellant's conduct amounted to an *implied* agreement that it would not foreclose. In this regard the observation of the court in *Young v. Bank of California,* 88 Cal. App. 2d 184 (1948), is particularly apposite. when it is said, page 186:

> "There can be no estoppel when the party against whom the defense is invoked has plainly caused the other to believe the 'particular thing' relied on is not true and that he acts at his own risk."

We further cannot see how it could be said by any average, intelligent human being that Appellant's conduct left "nothing to surmise or questionable inference" and was "plain and not doubtful". This is especially true when the conduct sought to be relied upon extends over a very protracted period of time encompassing the first phases of an ordinary bankruptcy, a Plan of Arrangement that fell through, more ordinary bankruptcy and, finally, an Amended Plan of Arrangement which actually contemplates and does not outlaw foreclosures. Can it be said that there is any evidence in the record which would justify a prudent man in saying, "We are free to do with the service station properties as we choose, for Farmer Bros. Co. has in essence assured us that it will not seek to enforce its trust deed at any time in the future"? The answer is plain, and the question is obviously rhetorical.

D. No Showing of Detriment or Prejudice to General Unsecured Creditors.

Lastly, one of the essential ingredients of equitable estoppel is detriment, prejudice, or change of position on the part of the one asserting the estoppel. This is the fourth "element" of estoppel *in pais* set forth in *Safway Steel Products, Inc. v. Lefever, supra.* Except for the acts of Arden Farms Company and Carnation Company, which lend themselves to separate discussion and are discussed in detail, *infra,* there is absolutely no evidence in the light of the entire record, nor any finding of fact to the effect that Appellee or any general, unsecured creditor, has or has not done a single thing which would inure to its detriment or otherwise result in its injury on account of any conduct herein on Appellant's part. Surely, had Appellant

insisted from the outset that it would foreclose at the earliest possible time, the most that could have been done would be to place Appellee in an ordinary bankruptcy. Instead, the unsecured creditors have gained four years of time while Appellant has gained nothing.

V.

Finding of Fact XXII Provides No Basis for Application of Estoppel.

The only other Finding of Fact upon which an estoppel could be predicated is XXII [Tr. Rec. p. 70] wherein the court found:

> "That Carnation Company and Arden Farms Co., substantial creditors herein, each advanced the sum of $74,950.00 and three other creditors advanced smaller sums, all for the purpose of paying administration expenses, labor claims, tax claims and other claims having priority of payment, in order that the Plan of Arrangement might be approved and in doing so, relied upon the statement by Farmer Bros. Co. that it would abide by the terms of the Plan of Arrangement, and the Court further finds that said creditors would not have advanced this very substantial sum of money in order to complete the Plan of Arrangement had not Farmer Bros. Co. led each of them to believe that it would abide by the terms and conditions of the Plan of Arrangement. The Court further finds that this contribution by Carnation Company, Arden Farms Co. and the three other creditors very substantially benefited the position of Farmer Bros. Co. as a secured and unsecured creditor herein."

Discussion of this Finding has been reserved for last because it would seem to be the one most likely to be seized upon as supporting the Conclusions of Law and the Order ultimately made denying Appellant leave to foreclose. We will show that it does not.

The historical basis for this Finding lies in these events, heretofore chronicled:

On June 6, 1961, a Petition was filed in the court below under Section 321, Chapter XI of the Bankruptcy Act, proposing a Plan of Arrangement with Appellee's creditors; and, on June 22, 1961, an Order was entered dismissing Chapter XI proceedings and directing that bankruptcy be proceeded with. Ultimately, it was decided to try again to go under Chapter XI by proposing an Amended Plan of Arrangement. During the month of January, 1963, the following events transpired upon which Finding of Fact XXII is based: Appellee's witness Baird, of Carnation Company, testified as follows:

> "After the first plan fell because of lack of money, Mr. Tongue, on behalf of Arden Farms and the other creditors, and Mr. Baird on behalf of Carnation Company primarily approached major creditors with various schedules showing what they felt was the amount of money necessary to obtain confirmation of the plan, and asked such creditors to furnish sufficient funds to cause the confirmation of the amended plan of arrangement. Originally, the creditors were discussing a figure of $150,000.00. Carnation Company and Arden Farms Company deposited with Richard B. Newton $74,950.00 each. Other contributions were made by Four-S Baking, Dohrmann Hotel Supply, and

Fred E. Keeler, II, to bring it up to the amount of money that it was determined would be necessary to cause consummation of the plan. The amount of money necessary was discussed in the presence of Farmer Bros. Co.'s representatives and they were asked to contribute. Mr. Heistand of Farmer Bros. Co. was asked to contribute a portion of this fund. The contributing creditors felt the greater the participation they had among the creditors, the better it would be. Mr. Heistand replied that his company did not desire to contribute to this fund.

"Mr. Baird further testified that as a part of the contributing creditors' fund, his company felt that the Plan of Arrangement was feasible and it also wanted to be repaid; that there had been discussed various methods of securing this money, but his company wouldn't have advanced this money if it were not possible to confirm the plan of arrangement to be followed by an ultimate consummation of the plan.

"At these meetings when a representative of Farmer Bros. Co. was present, the question of the cooperation of the lien creditors in carrying out the intent and purpose of the plan of arrangement was discussed—in other words, that there would be no foreclosure.

"At a meeting of the creditors' committee held on January 10, 1963, at which Mr. Heistand of Farmer Bros. Co. was present, the question of the necessary commitments from the junior lien holders was discussed. A committee of Mr. Cummins, Mr. Tongue and Mr. Baird was appointed to contact junior lien holders.

"At this last mentioned meeting at which the discussions were had regarding these commitments and the contacting of junior lien holders, Mr. Heistand was present. Mr. Utley [Appellee's counsel] was present at this meeting, and discussed that generally a Chapter XI proceeding affects and is binding upon all unsecured creditors if a majority in number and amount of creditors vote in favor of the plan and consent to the plan, but that these consents do not bind junior lien holders, unless they consent. Mr. Heistand to the best of Mr. Baird's memory, did not say anything. Mr. Baird determined from his investigation whether or not to recommend to Carnation Company to advance the $74,950.00. Mr. Baird contacted Rosemary Ballman, who holds the fourth trust deed and personally talked to her. She said she would not do anything to upset the consummation of the plan. The third trust deed was at that time owned by Mr. Keller, who purchased from the H.Y.C. Bankruptcy in San Francisco, and he felt that the debtor had sufficient action pending in the Bankruptcy Court that he could gamble on sustaining debtor's position before the Court, so he was not too much worried about the Keller third; and he felt that Farmer Bros. Co. had taken no action and had on so many occasions indicated that it was going to go along with the debtor, he felt that was sufficient.

"Farmer Bros. said it would go along as it had in the past, and it had not attempted to foreclose in the past. Mr. Baird testified that he believed it was Mr. Heistand who was the last one of

Farmer Bros. Co. representatives to make this statement.

"Before the decision was made to advance this fund for the purpose of perfecting the plan of arrangement, Mr. Baird went to his superior, Mr. Hartwick, and discussed it with him. The question of the reliance on Farmer Bros. Co.'s promise to cooperate was raised and the decision was made to advance the funds in reliance upon the facts as he then knew them and presented them to Mr. Hartwick. Mr. Baird testified that he would not have made the recommendations to advance that fund had it not been for the statement which Farmer Bros. had made, indicating that it would cooperate and stand by as it had in the past." [Ref. Cert. Rev.; Tr. Rec. pp. 120-123].

Mr. Tongue of Arden Farms Company, called by Appellee, testified as follows:

". . . that on January 17, 1963, he discussed with Mr. Heistand the plans of the contributing creditors to raise the cash to satisfy the preference claims. That Mr. Heistand stated he would have to submit the matter to his company for consideration. That he later had a conversation with Mr. Heistand about the subject matter, and Heistand later called Mr. Tongue to tell him that he did not think his company would contribute cash to the plan. That he later discussed this matter with Mr. Heistand, and Mr. Heistand's comment at that time was that either he or representatives of his company would be present at the hearing in Court in the ensuing two or three days when the plan was going to be presented for confirmation, and

that if the court accepted the plan the matter would again be reviewed by Farmer Bros. Co. He commented then and had previously commented on a number of occasions that Farmer Bros. had always acted for the best interest of the estate and could see at that time no reason for changing its viewpoint. Up to that time Farmer Bros. Co. had never attempted to foreclose and had made no demands for its money, of which Mr. Tongue was aware.

"That the statements of Mr. Heistand had an influence upon Mr. Tongue's recommending that his company advance the money for the purpose of paying administration expenses and prior claims that Mr. Baird had testified to; and in making the recommendation to his company, Mr. Tongue stated that he certainly was depending upon a continuance of all of the junior liens, including the Farmer Bros. lien, in order to hold the package together. That Mr. Heistand's comment was that they had always acted for the best interests of the estate, and Mr. Tongue certainly felt that cooperation on the plan would be in the best interest of the estate, and that he relied upon Mr. Heistand's statement in recommending advancing the money for the purpose of perfecting the plan. That it would have been a very serious situation to ask his company to put up that sum of money in the face of a possible foreclosure action. Mr. Tongue testified that at the time he recommended that his company advance the money for the purpose of paying administration expenses and prior claims, he believed that he would receive full cooperation

from Farmer Bros. Co. in carrying out the terms of the plan, and that he would not have recommended that his company advance the funds had he not so believed; that Mr. Heistand's attitude at the time influenced him in making the recommendations which he made to his company to advance the funds." [Ref. Cert. Rev.; Tr. Rec. pp. 135-136].

The foregoing is the only evidence which would support the Finding that before Carnation and Arden advanced money to confirm the [Amended] Plan, Appellant ". . . led each of them to believe that it would abide by the terms and conditions of the [Amended] Plan of Arrangement."

A. Appellant Has, Appellee Has Not Abided by the Plan.

The Amended Plan of Arrangement [Tr. Rec. pp. 3-19] does not prohibit foreclosures. Likewise, no one, including Carnation and Arden, asked Appellant to waive its right to foreclose or to forebear from foreclosing and, in fact, as detailed *supra,* Appellant had expressly refused to agree to such on several occasions. If Appellant led anyone to believe that it would abide by the terms and conditions of the Amended Plan, under the express provisions thereof, it could only have led them to believe that it would seek approval of the court prior to any foreclosure action. It did exactly that.

Appellant's conduct in this regard should not be minimized, for the Order Confirming and Approving Plan of Arrangement as Amended [Tr. Rec. pp. 20-29] does not on its face purport to enjoin foreclosures

and it is otherwise unsettled as to whether or not, absent an injunction, leave of court need otherwise be sought. In *Collier on Bankruptcy,* 14th Ed., Vol. 8, p. 269, it is said:

> "Whether or not a secured creditor can foreclose on this security without the consent of the court is a question to which the language of §314 does not specifically address itself. Section 314 talks in terms of staying or enjoining any foreclosure proceeding 'upon notice and for cause shown,' and as has been pointed out above, the relief provided for therein is not automatic. This factor, coupled with the fact that Chapter XI proceedings are not designed to deal with secured claims but only with unsecured creditors, and with the fact that Chapter XI contains no provision similar to that of Chapter X to the effect that approval of the petition shall operate as a stay of any act to enforce a lien could arguably be said to support the proposition that a secured creditor need not procure the consent of the court before proceeding to enforce a security interest."

On the other hand, while Appellant hued to the provisions of the Amended Plan, Appellee did not. We have pointed out heretofore that the Amended Plan provided for payments in *monthly installments* of the interest on junior liens and that this provision had been breached. It would seem implicit in the reasoning behind the doctrine of equitable estoppel that any false representations be made to secure some gain or advantage. There is absolutely no evidence that Appellant, as a secured creditor, has received any benefit whatsoever by the advance made by Arden and Carnation or

from the confirmation of the Amended Plan. It stands, in reality in the same position in which it stood when it received its note and deed of trust nearly a decade ago, with no prospects of relief in sight save for the action we strenuously insist this Court take.

B. Estoppel Inapplicable Absent Detriment to Arden or Carnation.

There is no evidence in the entire record to show how Carnation or Arden would be prejudiced or otherwise injured if Appellant be permitted to foreclose. Although both parties advanced substantial sums to secure confirmation of the Amended Plan, neither will be injured unless Appellee can demonstrate that there is some Finding of Fact, or evidence in the record, tending to show that they will not be repaid. There is no such evidence, hence no such finding.

Both of these parties, at the time of the hearing on Appellant's Petition for Leave to Enforce Trust Deed had already received substantial repayment of their investment. Carnation's Mr. Baird testified, ". . . that of the advance of $74,950.00, his company had been repaid approximately one-half of the sum advanced" [Ref. Cert. Rev.; Tr. Rec. p. 124, lines 17-19], while Arden's Mr. Tongue testified, somewhat ambiguously, that Arden, ". . . has received back its pro rata share of the overage funds that had been supplied, and has received some payments from the trust deed it took as security on a piece of property, but there is still a substantial amount of that owing to Arden Farms." [Ref. Cert. Rev.; Tr. Rec. p. 134, lines 9-13]. It should be pointed out, parenthetically, that Arden holds no trust deed on any property secured by Appellant's deed of trust.

Most important is that the ultimate repayment of such advances is not secured by the parcels encumbered by Appellant's deed of trust and neither the current source of such repayment as has been made nor the ultimate source thereof comes from the income of Appellant's secured properties. All of such income is presently assigned to, and is being collected by United California Bank amortizing a secured note due and payable to the bank in full on or before September 1, 1970. Secondly as pointed out before, the Court expressly found [Find. of Fact XVI, Tr. Rec. p. 68]:

> "That there are funds in substantial amounts coming into debtor's estate, other than from rentals of the various service stations described in Farmer Bros. Co.'s Petition, which are and will be available for the execution of the Plan of Arrangement. That there are no certificates of indebtedness to be paid."

From the foregoing, how can it be said that Arden or Carnation, or any other creditor that advanced funds to secure confirmation of the Amended Plan, will suffer any detriment if Appellant be permitted to foreclose? In fact, it would seem that if Appellant be permitted to foreclose, any funds available for payment of current interest on junior liens under Paragraph XI, Article X of the Amended Plan, heretofore quoted, in the sum of up to $18,492.00 per annum, would become free to be applied in other places.

Certificate.

I certify that, in connection with the presentation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

EDWARD M. LYNCH